United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Michael J. Rovell

Bankruptcy No. 95 B 21171

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Judge: Ginsberg

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	**)**	**Chapter 11**
	)	
MICHAEL J. ROVELL,	**)**	**No. 95 B 21171**
Debtor.	**)**	
	)	**Hon. Robert E. Ginsberg**

MEMORANDUM OPINION AND ORDER

This matter is before the court on the motion of Michael J. Rovell, the Debtor, for summary judgment on American National Bank's ("ANB") claim for attorney's fees. For the reasons stated below, the court finds that there are no material issues of fact in dispute, and that the Debtor is entitled to judgment in its favor as a matter of law. Accordingly, the Debtor's motion is granted.

Standards for Summary Judgment

To prevail on a motion for summary judgment, the movant must meet the criteria set out in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings in bankruptcy cases under Federal Rule of Bankruptcy Procedure 7056. Summary judgment is appropriate if the entire record, including pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

Summary judgment is granted to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355, 89 L. Ed. 538 (1986). The movant bears the burden of showing that no genuine issue

of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322. Once the motion for summary judgment is supported by a *prima facie* showing that the moving party is entitled to judgment as a matter of law, Rule 56(e) provides that a party opposing the motion may not rest upon the mere allegations or denials in its pleadings; instead, the response of that party must set forth specific facts showing that there is a genuine factual issue for trial. Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 587; Doe v. Cunningham, 30 F.3d 879, 882 (7th Cir. 1994); Waldridge, 24 F.3d at 920.

Procedure for Summary Judgment Motions

Local Rule 402.M of the Local Bankruptcy Rules adopted for this District, requires a party moving for summary judgment to file, among other things, a detailed statement, known colloquially as a "402.M Statement." It consists of a statement of the material facts as to which the movant contends there is no genuine issue. The 402.M statement "shall consist of short numbered paragraphs, including, within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Local Rule 402.M, U.S. Bankruptcy Court, N.D. Illinois (1996).

A party opposing a summary judgment motion is required by Local Rule 402.N to respond to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact.

Compliance with Local Rules 402.M and 402.N is not a mere technicality. Courts rely on the information presented in these statements to separate the facts about which there is a genuine dispute

from those about which there is none. American Ins. Co. v. Meyer Steel Drum, Inc., 1990 WL 92882 at *7 (N.D. Ill. June 27, 1990). The statements required by Rule 402 are not to be superfluous abstracts of the evidence. Rather, they are intended to assist the court in determining what facts are in dispute and to point the court to specific evidence in the record that supports a party's contentions on each of these questions of fact. In other words, the pleadings required by the Local Rules assist the court in fulfilling its most basic task in resolving a summary judgment motion, *i.e.*, determining whether there actually are unresolved issues of material fact between the parties. Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994).

In the instant proceeding, the Debtor has not filed a 402.M statement as part of his summary judgment motion, nor has ANB filed a 402.N statement. However, on or about February 26, 1999, pursuant to an order of this court, the parties filed a joint prehearing statement ("Prehearing Statement") in connection with ANB's motion for the allowance of its fees.[1] The Prehearing Statement contains a "Joint Statement of Uncontested Facts ("Uncontested Facts")," a "Creditor's Statement of Contested Facts," and "Debtor's Statement of Contested Facts." In the interest of judicial economy, the court will overlook the fact that no 402.M statement was filed with the motion for summary judgment and that no 402.N statement was filed with ANB's response to the Debtor's motion for summary judgment. The court deems the statements contained in the Prehearing Statement sufficient to satisfy the parties' obligations under the Local Rules.

Undisputed Facts

[1] The Prehearing Statement was jointly prepared and filed by the parties pursuant to court order in connection with a Prehearing Conference the court held on the ANB claim.

The undisputed material facts with respect to the Debtor's motion for summary judgment, as determined by this court from the various documents filed by the parties are as follows:

ANB loaned $50,000 to the Debtor. As collateral for that loan, the Debtor gave ANB a security interest in one of his automobiles, a 1990 Bentley Rolls Royce Turbo R. That security interest is properly perfected. (Menges, Mikus & Malzahn Motion for Compensation and Expenses, Exhibit N). The loan agreement requires the Debtor to pay certain of ANB's legal costs incurred in connection with the loan to the Debtor:

> Borrower agrees to pay, upon Bank's demand therefor, any and all costs, fees and expenses (including attorney's fees, costs and expenses) incurred in enforcing any of Bank's rights hereunder, and to the extent not paid the same shall become part of Borrower's Liabilities hereunder. (Uncontested Facts para. 9)

The Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code on October 6, 1995. (Uncontested Facts para. 1). On or about January 10, 1996, ANB filed a proof of claim asserting a $50,081.25 claim secured by the Bentley Rolls Royce ("Proof of Claim"). A rider attached to the Proof of Claim itemized the claim as $50,000 in principal as of the petition date, and $81.25 in interest due as of the petition date. (Uncontested Facts para. 3; Proof of Claim attached to Motion for Summary Judgment). The Proof of Claim made no reference whatsoever to attorney's fees. On January 18, 1996, this court entered an order authorizing Steven Rouse, Jennifer Kaiser and the law firm of Menges, Mikus & Molzahn to appear as counsel for ANB. (Uncontested Facts para. 4).

The Debtor objected to the amount claimed by ANB. The Debtor did not contest the validity of the loan agreement. Rather, the Debtor contended that the amount he owed to ANB under the loan agreement should be offset against the amount of damages he suffered as a result of ANB's actions

in connection with a stop payment order issued by the Debtor.[2] On March 17, 1997, the court conducted an evidentiary hearing on the Debtor's claim for setoff. Based on the evidence presented, the court held that ANB's claim would be allowed in full, without setoff.[3]

Also on March 17, 1997, this court confirmed the Debtor's proposed chapter 11 plan ("Plan"). In connection with ANB's claim the Debtor's Plan provided as follows:

> ANB is the holder of the Allowed Class 5 Claim. ANB shall retain the liens and security interests it had against the Debtor's property as of the filing of this Chapter 11 case.
>
> Commencing with the first full month following the Effective Date and continuing monthly thereafter until all sums due ANB are paid in full, the Debtor shall make equal monthly principal and interest payments to ANB as follows:
> (a) in 60 payments if the claim is allowed in the approximate sum of $50,000; or
> (b) in 12 payments if the claim is allowed in the amount of approximately $13,000.

The confirmation order provided:

> Upon confirmation of the Plan, the Debtor shall be discharged of any and all obligations due any creditor and party in interest, except as provided herein. This discharge shall be complete and without condition.

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[2] This dispute arose when the Debtor issued a check in the approximate amount of $19,125 ("Check 1") to Private Eyes for services Private Eyes rendered to the Debtor. After he sent Check 1 to Private Eyes, the Debtor discovered that the amount of Check 1 was incorrect. The Debtor sent Private Eyes another check, this one for the correct amount ("Replacement Check"), together with a letter explaining that Check 1 was issued in error. In the letter, the Debtor asked Private Eyes to return Check 1 to him. Before the Debtor sent the letter and Replacement Check to Private Eyes, Linda Fair, his colleague, contacted ANB about Check 1. She asked ANB, the drawee, whether Check 1 had been honored, and was told that Check 1 had not yet been honored. Fair asked ANB to place a stop payment order for Check 1. It turned out that ANB was wrong about the status of Check 1: Check 1 had been presented and paid. Thereafter, the Replacement Check was also honored, resulting in a significant overpayment to Private Eyes. It also, according to the Debtor, contributed to the overdrawn status of his ANB account.

[3] This judgment was affirmed by the United States Court of Appeals for the Seventh Circuit on October 21, 1999, Rovell v. American National Bank (In re Rovell), 194 F.3d 867 (7th Cir. 1999).

On May 5, 1999, ANB filed a fee application seeking allowance of $75,116 in legal fees and $3,167.20 in expenses it incurred in this case from December 12, 1995 through May 5, 1999. The fee petition categorizes the fees sought to be compensated for as follows:

Analysis of the file and preparation of ANB's claim:	$ 1,092.00
Lack of adequate protection and ANB's motions for relief from the automatic stay	$ 4,568.00
Representation of ANB in its treatment under the plan and subsequent confirmation	$ 1,260.00
Objection to ANB's claim by the Debtor	$ 1,215.00
Response to objection to ANB's claim	$ 2,040.00
Discovery and legal research for the evidentiary hearing on objection	$ 4,965.00
Preparation of pre-hearing statement, conclusions of fact, conclusions of law	$ 2,683.50
Evidentiary hearing on the objection to ANB's claim	$ 8,385.50
Motion for reconsideration of objection to ANB's claim	$ 3,456.50
Motions of Debtor and ANB's fee petition	$18,850.00
Debtor's notice of appeal	$15,029.00

The Debtor objects to the fees sought by ANB and contends that as a matter of law, ANB is not entitled to the fees it seeks. The Debtor argues that because the Plan did not provide for fees to be paid on ANB's claim, and because ANB did not seek payment of its attorneys fees under the Plan, principles of res judicata preclude ANB from now seeking to litigate the question of its entitlement to be reimbursed for the fees and expenses it incurred in this case.[4]

[4] In addition to the res judicata contention, the Debtor makes several alternative arguments in favor of its motion for summary judgment: (1) partial summary judgment is appropriate because the loan agreement permits ANB to recover legal costs incurred only in connection with enforcing its rights under the loan agreement, and defending against the Debtor's claim for offset does not fit within that category; (2) some of the fees sought are for work that was unnecessary; (3) at least a portion of the fees should not be allowed because an indemnitee, i.e., ANB, is not entitled to fees incurred in enforcing an indemnification provision; (4) a portion of the fees are for unnecessary and duplicative services; and (5)ANB's fees for matters relating to the fee petition itself should be limited to 3% of any fees awarded. Several of these defenses would require further pleading, further discovery, and an evidentiary hearing. The court will limit its opinion to those issues which are necessary to resolve the motion before the court.

Conclusions of Law

The Debtor contends that principles of res judicata bar ANB from recovering attorney's fees from the Debtor. In response, ANB contends that the Debtor waived the defense of res judicata, and that res judicata is inapplicable because the chapter 11 plan itself preserved ANB's right to seek attorney's fees.

Waiver

ANB contends that the Debtor waived the defense of res judicata because the Debtor did not dispute ANB's entitlement to fees when ANB filed its various fee applications.[5] Waiver is "an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed." Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1275 (7th Cir. 1996), reh'g denied (1996) (quoting Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1009 (2d Cir.1991)). As ANB notes, this court denied each of ANB's fee petitions as premature because the litigation concerning the Debtor's claim for setoff had not been completed. The denials were without prejudice to ANB's pursuit of the fee applications at an appropriate time. When it denied ANB's request for fees, the court did not give either ANB or the Debtor an opportunity to be heard on the matter. The Debtor was afforded no opportunity by the court to litigate the question of whether ANB was entitled to fees. Under these circumstances, due process concerns preclude this court from finding that the Debtor abandoned or waived his right to object to ANB's fee application without first affording the Debtor notice and an opportunity to be heard on the fee application.

[5] ANB filed fee petitions on November 11, 1997, January 20, 1998, and November 19, 1998.

Effect of the Plan/Res Judicata

Section 1141(a) of the Bankruptcy Code provides:

> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

ANB contends that its right to recover fees was preserved under the Plan because ANB retained "... the liens and security interests it had against the Debtor's property as of the filing of this Chapter 11 case." It is ANB's position that because its outstanding loan to the Debtor remains secured by the Debtor's Rolls Royce, it is simply pursuing the rights it had and has against the Debtor. ANB confuses its lien rights/security interest with the loan agreement. A security interest in the Rolls Royce gives ANB an interest in that property such that ANB could sell the Rolls Royce if the Debtor defaulted on his obligations to ANB under the Plan. The security interest does not give ANB the right to seek attorney's fees from the Debtor; the loan agreement gives ANB the right to recover certain attorney's fees from the Debtor. Once the Plan was confirmed, ANB became bound by the Plan's terms. 11 U.S.C. sec. 1141(a). After confirmation, the Plan alone governs the relationship between ANB and the Debtor, replacing, in effect, the loan agreement. See In re Sanders, 243 B.R. 326, 330 (Bankr. N.D. Ohio 2000)(citing with approval a commentator's[6] statement that a confirmed chapter 13 plan defines the relationship between the debtor and creditor). Because the Plan does not provide for ANB to recover attorney's fees, there is no document under which ANB's right to attorney's fees is preserved. See In re Penrod, 50 F.3d 459 (7th Cir.

[6] Lundin, K.M., Chapter 13 Bankruptcy, section 6.9, 6-4 and 6-5 (1997).

1995)(creditor bound by terms of confirmed plan which discharged its lien even though lien and claim were not challenged during the case).

Whether ANB can litigate the issue of its entitlement to collect attorney's fees from the Debtor must be analyzed in the context of section 1141(a) of the Bankruptcy Code. Although the parties have briefed the issue of the application of res judicata, the effect of a confirmed plan is best analyzed under section 1141(a) of the Code. See Sanders, 243 B.R. at 328(after a chapter 13 plan is confirmed, section 1327 of the Bankruptcy Code bars the relitigation of issues that were or could have been raised in the plan process.) In the instant proceeding, section 1141(a) of the Bankruptcy Code bars the relitigation of any issues that were raised or that could have been raised in the confirmation proceedings. Sanders, 243 B.R. at 328; In re Chattanooga Wholesale Antiques, Inc., 930 F.2d 458, 463 (6th Cir. 1991); In re Varat Enterprises, Inc., 81 F.3d 1310, 1315 (3rd Cir. 1996). The bar imposed by section 1141 is rather similar to the bar imposed by res judicata in bankruptcy cases, since res judicata prevents parties from relitigating claims that were or could have been raised in an action in which a final judgment was entered. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); D & K Properties Crystal Lake v. Mutual Life Ins. Co. of New York, 112 F.3d 257, 259 (7th Cir. 1997). But, as the court in Sanders notes, section 1141(a) of the Bankruptcy Code is analogous to section 1327 of the Bankruptcy Code, and preclusion under section 1327 of the Bankruptcy Code is more broad than issue preclusion. Sanders, 243 B.R. at 328. Traditionally, issue preclusion bars litigation of an issue only if that issue were actually litigated and decided, and if the resolution of that issue was necessary to the judgment. However, section 1327 of the Bankruptcy Code bars litigation if the issue could have been decided at confirmation, regardless of whether it was decided. Id. at 328 (citing In re Welch, 1998 WL 773999 *2 (6th Cir.)) Under section

1141 of the Bankruptcy Code, parties cannot relitigate issues that were raised or could have been raised in the confirmation proceedings. Id.

The Plan delineates the treatment ANB's claim is to receive. The Plan provides that if ANB's claim is allowed in the approximate amount of $50,000, then the Debtor will make 60 equal monthly payments of principal and interest to ANB. The Plan does not mention attorney's fees. The confirmation order submitted along with the Plan stated that:

> "Upon confirmation of the Plan, the Debtor shall be discharged of any and all obligations due any creditor and party in interest, except as provided herein. This discharge shall be complete and without condition."

ANB had notice of the Plan and of the confirmation hearing. In fact, a representative of ANB was present in court during the confirmation hearing. ANB had ample opportunity to object to confirmation of the Plan because the Plan failed to include payment of attorney's fees incurred by ANB. At the time of confirmation, the Debtor had objected to the amount of ANB's claim, and the parties litigated this issue on March 17, 1997. ANB could have litigated its entitlement to attorney's fees at that time, and could have sought to amend its proof of claim to include attorney's fees. Despite receiving notice of the Plan and notice of the confirmation hearing, and despite actively litigating the amount of its claim, ANB did not object to its treatment under the Plan. ANB failed to object to its treatment under the Plan even though at the time of confirmation, ANB had incurred attorney's fees for which it would seek payment from the Debtor. Although ANB mentioned at the confirmation hearing that it intended to seek attorney's fees, ANB did not object to confirmation of the Plan and did not seek attorney's fees in accordance with established procedure until November 1997. ANB had an opportunity to raise and litigate its entitlement to attorney's fees in connection with the Debtor's objection to its claim and at the confirmation hearing but chose not to litigate the

issue. Consequently, the court finds that ANB's request for fees is barred under section 1141(a) of the Bankruptcy Code.[7]

In light of this court's finding that section 1141(a) of the Bankruptcy Code prevents ANB from litigating its entitlement to attorney's fees, the court need not and does not address ANB's contention that it is entitled to fees under section 506(b) of the Bankruptcy Code and that the loan agreement authorizes ANB to seek payment of all the fees it incurred in the instant proceeding; nor does the court reach the issue of whether it was reasonable for ANB to incur $75,000 in fees to pursue a $50,000 claim. Matter of Taxman Clothing Co., 49 F.3d 310, 315 (7th Cir. 1995).

Conclusion

For the reasons stated, the Debtor's motion for summary judgment on American National Bank's fee petition is granted.

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[7] Analysis under res judicata would yield the same result. Three requirements must be satisfied for res judicata to apply: (1) an identity of parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits. D & K Properties Crystal Lake v. Mutual Life Ins. Co. of New York, 112 F.3d 257, 259 (7th Cir. 1997); Andersen v. Chrysler Corp., 99 F.3d 846, 852 (7th Cir. 1996) (citing Kratville v. Runyon, 90 F.3d 195, 197 (7th Cir. 1996)); Brzostowski v. Laidlaw Waste Sys., Inc., 49 F.3d 337, 338 (7th Cir. 1995)(res judicata bars not only matters determined in a prior suit, but matters which could have been determined in that suit but were not raised.).

There is an identity of the parties since the Debtor and ANB are the parties to the dispute regarding the allowance of ANB's fees and both were parties to the confirmation of the Debtor's chapter 11 plan. There is also a final judgment on the merits, i.e., the unappealed order confirming the Plan. In re Varat Enterprises, Inc., 81 F.3d 1310 (4th Cir. 1996).

The final element, an identity of causes of action or an opportunity to litigate an issue, is satisfied because ANB had knowledge of its treatment under the Plan and was present in court for the confirmation hearing. The Plan does not provide for ANB to recover attorney's fees. ANB could have objected to its treatment under the Plan at the confirmation hearing. ANB did not object to the Plan's confirmation. In addition, ANB could have raised its entitlement to attorney's fees during the litigation concerning the amount of ANB's claim. ANB failed to do so.

ENTERED:

February 17, 2000

Robert E. Ginsberg
United States Bankruptcy Judge